

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

31554

FILE: B-217565

DATE: June 27, 1985

MATTER OF: Laurie M. Brown

DIGEST:

1. A provision of the United States Code authorizes military leave at the rate of 15 days per year for Federal employees who are members of Reserve components of the armed forces. On October 10, 1980, that provision was amended to change the method of granting annual military leave from a calendar year to a fiscal year basis. The amending legislation provided that it was to "take effect October 1, 1980," that is, on the first day of fiscal year 1981, or 10 days earlier than its date of enactment. The amendment must be given retroactive effect, since amending legislation may not be construed as being only prospective in its operation if it contains express language requiring retrospective application.
2. A Federal employee who was a member of the National Guard could not transfer 10 days of military leave from calendar year 1980 to fiscal year 1981 when legislation changed the method of granting military leave from a calendar year to a fiscal year basis. The employee suggests that the retroactivity of that legislation divested him of the 10 days' leave in contravention of his rights under the United States Constitution. It does not appear that the retroactivity of the statute divested the employee of any right, and, in any event, it is the policy of the Comptroller General not to question the constitutionality of a statute enacted by the Congress.
3. Legislation enacted in 1980 which changed the method of granting military

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leave for Federal employees from a calendar to a fiscal year basis operated to increase the military leave available to one employee from 10 to 15 days as of October 1, 1980. The employee was, however, misinformed by his personnel officer that under the new legislation he instead had 25 days' unused military leave to his credit on that date, and as a result he scheduled National Guard training duty exceeding his military leave entitlements the following year. The employee may not be allowed an additional 10 days' military leave on the basis of that misinformation, since in the absence of specific statutory authority the Government is not liable for the negligent or erroneous acts of its officers and agents.

Mr. Laurie M. Brown appeals our Claims Group's denial of his claim for an additional 10 days of military leave with pay from his civilian position with the Veterans Administration for military duty he performed in 1980 and 1981 as a member of the South Carolina Air National Guard. In light of the facts presented, and the applicable provisions of statute, we sustain the denial of Mr. Brown's claim.

Background

Statutory authority for the military leave at issue in this matter is contained in subsection 6323(a) of title 5, United States Code. That provision of the Code is derived from legislation originally enacted in 1917 which was designed to permit Federal employees who were military reservists to attend training and field exercises for up to 15 days each calendar year without loss of civilian pay or vacation time.^{1/}

Public Law 96-431, approved October 10, 1980, 94 Stat. 1850, amended 5 U.S.C. § 6323(a) to provide Federal employees who were members of the Reserve components of the armed forces with military leave at the rate of 15 days per

^{1/} Act of May 12, 1917, ch. 12, 40 Stat. 72.

fiscal rather than calendar year, and to allow the carryover of up to 15 days of unused military leave into a succeeding fiscal year. Public Law 96-431 further provided that these amendments "shall take effect October 1, 1980." The amendments were thus made retroactively effective 10 days prior to the enactment of Public Law 96-431 on October 10, 1980, to coincide with the beginning of fiscal year 1981 on October 1, 1980.

Prior to its amendment by Public Law 96-431 in October 1980, 5 U.S.C. § 6323(a) authorized military leave for up to 15 days on a calendar year basis, and there was no provision for the carryover of any military leave not used in one calendar year to the next succeeding calendar year. Furthermore, Public Law 96-431 did not provide for the carryover and credit of military leave which was unused in calendar year 1980 for use in fiscal year 1981. As a result, those employees who had not used all 15 days of military leave for calendar year 1980 by October 1, 1980, were not entitled to carry over the unused leave into fiscal year 1981 on that date. See Federal Personnel Manual Letter No. 630-30, April 23, 1982. Under the new law, the first time an employee was permitted to carry over unused military leave was from fiscal year 1981 to fiscal year 1982 on October 1, 1981.^{2/}

In 1980 and 1981 the claimant, Mr. Brown, was a civilian employee of the Veterans Administration and a member of the South Carolina Air National Guard. He was on active

^{2/} The October 1980 amendments to 5 U.S.C. § 6323(a) enacted by Public Law 96-431 were designed generally to allow more flexibility in the scheduling of military training for Federal employees who were members of the Reserve components of the armed forces, and to shift their annual training cycles from a calendar to a fiscal year basis in conformity with practices adopted by the Department of Defense for scheduling standard annual military training periods for reservists. See H.R. REP. NO. 1128, 96th Cong., 2d Sess., reprinted in 1980 U.S. CODE CONG. & AD. NEWS 3871. See also Retirement Appeals, Military Leave, and Quadrennial Pay Commission: Hearings on H.R. 5837, H.R. 6065, and H.R. 6373 before the Subcomm. on Compensation and Employee Benefits of the House Comm. on Post Office and Civil Service, 96th Cong., 2d Sess. 1, 4-16 (1980).

training duty with the National Guard between September 26 and October 10, 1980. He indicates that after he returned to his civilian position in October 1980, a Veterans Administration finance officer advised him that he had lost 10 days of his military leave for calendar year 1980 on October 1, 1980, due to the operation of Public Law 96-431. Mr. Brown indicates further that he disagreed with this advice and initiated an inquiry with his local civilian personnel office about the matter. He subsequently received contrary advice from a civilian personnel officer to the effect that his 15 days of military leave for calendar year 1980 could be used for the period he was on active training duty with the National Guard between September 26 and October 10, 1980, including the 10 days between October 1 and 10.

Mr. Brown states that on the basis of the advice he received from the civilian personnel officer, he later made arrangements to perform a 30-day period of active training duty with the National Guard from September 22 to October 22, 1981, in the belief that he would have 30 days of unused military leave from fiscal years 1981 and 1982 available to him to cover that period of training duty. After he returned to his civilian position in October 1981 from that period of military duty with the National Guard, however, his civilian finance office advised him that he did not have 30 days of military leave available for that 30-day period of training duty, and that he would have to use annual vacation leave or be placed in a leave without pay status for a portion of his absence. It was explained to him that this situation had resulted from his inability to carry over and use the 10 days of military leave for calendar year 1980 after October 1, 1980. Mr. Brown indicates he again disagreed and made further inquiry at his civilian personnel office, but the civilian personnel officer then retracted the advice earlier provided in the matter. Mr. Brown then elected to use annual vacation leave rather than take leave without pay for that portion of his 1981 National Guard training period which could not be covered by the military leave remaining available to him.

Issues

Mr. Brown suggests that the provisions of Public Law 96-431 were misconstrued and that as a result he was improperly divested of 10 days' military leave for calendar

year 1980, since he had been entitled to that leave and had already used it between October 1 and 10, 1980. He suggests that the situation would be rectified if Public Law 96-431 were to be construed as having only a prospective application from and after its date of enactment on October 10, 1980. He adds--

"Although the constitutional protections against 'ex post facto' laws deal, for the most part, with criminal and not civil matters, there is some precedent which suggests that the manner in which P.L. 96-431 was applied in my case was incorrect. I was deprived, retroactively, of something of value (my leave) after I had used it. I feel that I am entitled to compensation, either monetary or in the form of restored leave (annual), because of the misapplication of P.L. 96-431 to my case."

Alternatively, Mr. Brown indicates that he made arrangements for the 30-day period of training duty he performed with the National Guard in 1981 in good faith reliance on the advice he received from his personnel office that 30 days of military leave were available to him, and in effect he questions whether his claim may be allowed on the basis of that advice.

Analysis and Conclusion

It is a well settled rule of statutory construction that an amendment of a statute is not to be construed as retroactively effective unless it is so provided in the amendment, either specifically or by necessary implication. Conversely, however, an amendment may not properly be construed as being only prospective in its operation if it contains express provision plainly requiring a retrospective application.^{3/} In the present case, as indicated, Public Law 96-431 expressly and plainly directs that the amendments provided for the granting of military leave under 5 U.S.C. § 6323(a) must "take effect October 1, 1980," and we have no

^{3/} See, e.g., Jasper v. United States, 43 Ct. Cl. 368 (1908); and 17 Comp. Gen. 92 (1937). See also 2 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 41.04 (4th ed. C.D. Sands 1973).

basis for otherwise construing the amendment as being effective prospectively only from the date of enactment 10 days later.

In addition, we recognize that the validity of legislative enactments having retroactive effects are often challenged in judicial proceedings on the basis of arguments that they may contravene specific provisions of the United States Constitution which variously prohibit criminal "ex post facto" laws, bills of attainder, the impairment of the obligations of contract, etc.^{4/} Nevertheless, retroactivity in and of itself is insufficient to make a statute invalid on constitutional grounds.^{5/} Moreover, in this case Mr. Brown was given military leave for the days he was absent on military leave after October 1, 1980. The amendment of October 10 merely changed the accounting for and accumulation of military leave. Thus, its effect on Mr. Brown's entitlement to pay for absences on military duty was prospective only. In any case, it is our longstanding policy not to question the constitutionality of a statute enacted by the Congress unless the Supreme Court has already ruled on the constitutionality of that or a similar piece of legislation.

Concerning the advice Mr. Brown received from his personnel office relating to his scheduling of National Guard training in 1981, we note that Public Law 96-431 had the effect of increasing the number of days of military leave immediately available to him as of October 1, 1980, from 10 to 15, so that on October 10 he had 5 days of military leave remaining for his immediate use. The personnel office apparently misadvised him that he had 15 days of military leave available as of October 10, 1980, and that he would gain an additional 15 days' military leave on October 1, 1981. Mr. Brown indicates that he made arrangements to schedule 30 days of National Guard training in September and October 1981 on the basis of this misinformation, and consequently he incurred an unexpected liability resulting


^{4/} See 2 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION, supra, §§ 41.03, 41.05-41.08.

^{5/} See, e.g., Frew v. Bowers, 12 F.2d 625, 627 (2d Cir. 1926), cert. granted 273 U.S. 682 (1926), dismissed 275 U.S. 578 (1927). See also the material cited above in footnote 4.

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in a charge against his annual leave account. Nevertheless, it is fundamental that in the absence of specific statutory authority the United States is not liable for the negligent or erroneous acts of its officers, agents, or employees, even though committed in the performance of their official duties.^{6/} Hence, Mr. Brown's claim may not be allowed on the basis of the misinformation he received from his personnel office.

Accordingly, we disallow Mr. Brown's claim and sustain our Claims Group's previous settlement in the matter.



Acting Comptroller General
of the United States

^{6/} See, e.g., Federal Crop Insurance Corporation v. Merrill, 322 U.S. 380 (1947); and 56 Comp. Gen. 943 (1977).